## Western Pipeline, Inc., Employer-Petitioner and Northern California District Council of Laborers, AFL-CIO. Case 20-RM-2803

July 15, 1999

## DECISION ON REVIEW AND ORDER

## BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On June 30, 1995, the Regional Director for Region 20 issued a Decision and Direction of Election in which he found that the Union had made an affirmative claim to represent the Employer's laborers, and that there was no contract bar to the processing of the Employer's RM petition. He therefore directed an election in the petitioned-for unit of laborers. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Union filed a timely request for review of the Regional Director's Decision, arguing that the Regional Director should have dismissed the petition. By Order dated August 1, 1995, the Board granted the Union's request for review.<sup>1</sup>

The Board has delegated its authority in this proceeding to a three-member panel.

The issue presented is whether the Union's request that the Employer execute a new collective-bargaining agreement or its conduct in pursuing its grievance and arbitration claims against the Employer to enforce a 1987 contract constitutes a sufficient basis to warrant processing the Employer's RM petition. Having carefully considered the entire matter, including the Employer's brief on review,<sup>2</sup> we find that the Union's conduct does not provide a sufficient basis for an RM petition. Accordingly, we reverse the Regional Director's decision and dismiss the petition.

The facts are undisputed. Dennis Morgan owned and operated Western Pipeline Company, Inc. (Western Pipeline Co.), an underground contractor, from 1972 until it went bankrupt in 1983. During its operations, Western Pipeline Co. entered into a series of collective-bargaining agreements with the Laborers District Council. These agreements did not purport to recognize the District Council as the majority representative of Western Pipeline's employees and at no time did the District Council or its locals claim to have or present any evidence of majority support.

In 1987, Glen Morgan, Dennis' father, formed another company, TPCO, with Dennis as vice president and managing officer, and Dennis' wife as secretary. TPCO

performed cast-in-place concrete pipe work. On June 30, 1987, Dennis Morgan executed a memorandum agreement with the District Council by which TPCO agreed to comply with the terms of the 1986–1989 Laborers' Master Agreement for Northern California. Dennis Morgan testified that TPCO was never presented with any showing of majority support. However, the signature page of the memorandum agreement provided that the signatory employer "affirms that he is a current employer of laborers, the majority of whom are represented by the Union." In February 1990, TPCO went out of business.<sup>3</sup>

Between 1986 and 1989, Tammy Morgan, Dennis' daughter, worked part-time for TPCO as a secretary. In May 1990, she formed Western Pipeline, Inc. (the Employer), which installs sewer, water, storm drain, fire, and gas lines. Tammy Morgan is the sole shareholder and president of the Employer, and is a member of its board of directors. Dennis Morgan initially applied for and obtained a license for the Employer from the State Licensing Board. Dennis Morgan also was listed initially as the Employer's responsible managing employee and agent for service of process, although Tammy Morgan subsequently obtained her own license and became the managing employee and agent. In 1992, Dennis and Kathy Morgan, who had been on the Employer's board of directors since its formation, withdrew from the board and were replaced by Tammy Morgan's brother-in-law and an unrelated individual.

In 1993, the Employer obtained a subcontract to perform certain work from a contractor signatory to the 1992-1997 Laborers' Master Agreement for Northern California. The Laborers' Agreement required all subcontractors to abide by the terms and conditions of employment set forth in the agreement during the subcontracting period. In August 1993, the Employer received a grievance from Laborers Local 185, a constituent local of the District Council, asserting that the Employer was an alter ego of Western Pipeline Co. and TPCO (both no longer in business) and, therefore, bound to the Laborers' Master Agreement; that the Employer had violated the Agreement by failing to inform the District Council of the Employer's change of name; and that the Employer had violated the Agreement by performing work under more than one name. At the same time, the District Council wrote to Tammy Morgan, alleging that the Employer was bound to the Master Agreement because it was an alter ego of Western Pipeline and TPCO.

In October 1993, Mark Breslin, a representative of the Engineering and Utility Contractors Association, a multiemployer association, met with Tammy Morgan, and told her that the District Council had asked him to convince her to sign a collective-bargaining agreement with

<sup>&</sup>lt;sup>1</sup> The election was held on July 28, 1995, and the ballots were impounded.

<sup>&</sup>lt;sup>2</sup> The Union also filed a motion seeking to strike the Employer's brief on review, arguing that the Board's Rules and Regulations do not permit such additional briefing. Contrary to the Union, however, Sec. 102.67(g) of the Board's Rules and Regulations specifically provides that appellants and other parties may, within 14 days after the Board issues an order granting review, file briefs with the Board. Consequently, the Union's motion to strike is denied.

<sup>&</sup>lt;sup>3</sup> TPCO later obtained discretionary reviver of its corporate status to pursue a lawsuit against a nonpaying general contractor. TPCO lost the suit and its corporate status was suspended on November 1, 1994.

the District Council. Breslin gave her a copy of the 1992 Laborers' Master Agreement to execute, but she declined. Tammy Morgan met with Breslin and representatives from the District Council in July 1994. At this meeting, they tried to convince her to sign the Master Agreement, even offering certain concessions as incentives. When she declined, the representative for the District Council stated that it would continue to enforce its alter ego claim, but that if she signed the alter ego issue "would disappear."

The Employer subsequently obtained another subcontracting job from a unionized contractor signatory to the terms of the Laborers' Master Agreement. In October 1994, Tammy Morgan received another grievance from Local 185 regarding the performance of work alleged to be covered by the Laborers' Agreement. Hearings on the grievances were held before an arbitrator in December 1994. The Employer filed the instant RM petition on December 21, 1994, and the arbitrator issued his decision on January 4, 1995.

The arbitrator found, inter alia, that the Employer, Western Pipeline Co., and TPCO were alter egos for collective-bargaining purposes, and that the Employer was therefore bound to the Laborers' Master Agreement.

In the RM proceeding, the Regional Director found that the Employer was neither a signatory to the Laborers' Master Agreement nor an alter ego of Western Pipeline Co. or TPCO, and, therefore, that the Employer was not bound to the Laborers' Master Agreement. The Regional Director further found, however, that the Union made a demand for recognition sufficient to support an RM petition by pursuing through grievance and arbitration its claim that the Employer was bound to the current Laborers' Master Agreement by virtue of its alter ego status with the signatory employers and by requesting that the Employer sign the current agreement. In its request for review, the Union argues that a question concerning representation does not exist because the Union was merely seeking to enforce its collective-bargaining agreement by filing a grievance and that it has never made any demand on the Employer based on majority support. The Union also contends that because the Employer is an alter ego of Western Pipeline Co. and/or TPCO, the Employer is bound to the Laborers' Master Agreement and, therefore, processing the petition is barred under the Board's contract bar principles.

At the outset, the Board need not defer to the arbitrator's decision as questions involving representation, accretion, or the appropriate unit are representation matters solely within the Board's province to decide.<sup>4</sup> We conclude, contrary to the Union, that deferral to the arbitrator's award is not appropriate under the circumstances

here.<sup>5</sup> Further, contrary to the Union, we agree with the Regional Director that the Employer is not an alter ego of Western Pipeline Co. and/or TPCO and that the petition is not contract barred. However, we find, contrary to the Regional Director, that the Union has not made a "claim to be recognized" within the meaning of Section 9(a) sufficient to process the RM petition.<sup>6</sup>

In determining alter ego status, the Board examines several factors, including common ownership, management, business purposes, operations, equipment, customers, supervision, and control of labor relations.<sup>7</sup> Here, there is no substantial interrelationship of financial or operational matters among the companies, and their labor relations and day-to-day management have been essentially separate. As noted above, Tammy Morgan is the sole shareholder of the Employer and has no ownership interest in the other companies, and none of the current board of directors had held positions in either of the other companies. Further, the Employer is located at a different facility; has a different phone number; uses separate accountants, banks, and insurance carriers; has separate suppliers and equipment; and has performed work for only one contractor that had previously done business with TPCO. Labor relations are completely separate and, of the 40 employees the Employer hired, only 6 had ever worked for TPCO. The fact that Dennis Morgan initially used his contractor's license to enable the Employer to receive a license, and leased the premises for the Employer, does not in itself warrant a finding of alter ego status. Nor is it determinative that Dennis Morgan may sometimes use the Employer's offices, prepare the Employer's cost assessments, review bids, or even visit the Employer's jobsite, as there is no evidence that it is anyone other than Tammy Morgan who makes all the labor relations, personnel, operations, and financial decisions. Thus, we find that the Employer is not an alter ego of Western Pipeline Co. and/or TPCO. Accordingly, as the Employer is not signatory to any contract with the Union, there is no contract bar to the petition.

We turn now to whether there is a sufficient basis to process the instant RM petition. It is well established that an employer's RM petition must be predicated on, inter alia, a union's "claim to be recognized as" the Section 9(a) representative. The claim for recognition need not be made in any particular form. For the reasons set forth below, we find that neither the Union's request that the Employer sign the most recent Laborers' Master Agreement nor its attempt to enforce its 1987 contract

<sup>&</sup>lt;sup>4</sup> Marion Power Shovel, 230 NLRB 576 (1977).

<sup>&</sup>lt;sup>5</sup> Compare St. Mary's Medical Center, 322 NLRB 954 (1997) (deferral appropriate where resolution of the representation issue turned solely on interpretation of the contract's "600 hour" limitation.)

<sup>&</sup>lt;sup>6</sup> Alter ego issues are cognizable in representation settings. *Elec-Comm, Inc.*, 298 NLRB 705 (1990).

<sup>&</sup>lt;sup>7</sup> Johnstown Corp., 313 NLRB 170 (1993).

<sup>&</sup>lt;sup>8</sup> Sonic Knitting Industries, 228 NLRB 1319 (1977).

<sup>&</sup>lt;sup>9</sup> American Lawn Mower Co., 108 NLRB 1589 (1954).

with TPCO against the Employer is sufficient to constitute a basis for processing the petition.

The Employer is, and TPCO was, an employer engaged in the construction industry. <sup>10</sup> In the construction industry, parties may create a relationship pursuant to either Section 9(a) or Section 8(f). In the absence of evidence to the contrary, the Board presumes that the parties intend their relationship to be governed by Section 8(f), rather than Section 9(a), and imposes the burden of proving the existence of a Section 9(a) relationship on the party asserting that such a relationship exists. <sup>11</sup> To establish voluntary recognition pursuant to Section 9(a) in the construction industry, the Board requires evidence that the union unequivocally demanded recognition as the employees' Section 9(a) representative, and that the employer unequivocally granted such recognition. <sup>12</sup>

There is no indication that the Union, in requesting that the Employer sign the most recent Laborers' Master Agreement, sought recognition as the Section 9(a) representative, nor is there language in the Agreement itself establishing that the Employer agreed to recognize the Union as the Section 9(a) representative. Although the record contains a copy of a current memorandum agreement that contains language sufficient to establish Section 9(a) status, 13 the copy was not attached to the exhibit purporting to be the Laborers' Master Agreement presented to the Employer. Indeed, there is no signature or even signature page, and Tammy Morgan testified that the Union only showed her a "contract" when it met with her. Thus, there is no evidence that Morgan was ever shown the Section 9(a) memorandum agreement and asked to sign it. In addition, there is no evidence that the Union requested that the Employer sign an agreement as a Section 9(a) employer or that the Union, in its request, claimed 9(a) representative status. Thus, the Union's actions are not inconsistent with a request for Section 8(f) recognition. At most then, the evidence shows that the Union demanded that the Employer sign a Section 8(f) contract, and the Board has held post-Deklewa that a

request or demand for a Section 8(f) contract does not support the processing of an RM petition.<sup>14</sup>

We further find that the Union's attempt to enforce its 1987 contract with TPCO against the Employer does not constitute a sufficient basis to support a Section 9(c)(1)(b) RM petition, regardless of whether that contract was a Section 8(f) or a Section 9(a) contract. As the Regional Director correctly found, the Employer was not a party to the 1987 contract, never signed the contract, and never was asked to sign that contract. Thus, the only remaining basis for the Union's "claim" that the Employer was subject to the 1987 contract is its contention that the Employer is an alter ego of Western Pipeline Co. and/or TPCO. As set forth, infra, we have found that the Employer is not an alter ego of Western Pipeline Co. and/or TPCO. As such, there remains no outstanding viable basis for the Union's contention, raised in its pursuit of its grievance and arbitration, that the Employer is subject to the 1987 contract. Consequently, with at most a demand for a Section 8(f) contract, there is no foundation for the existence of a current question concerning representation. It is axiomatic that the processing of a petition for an election is conditioned on the existence of a current question concerning representation. Absent a question concerning representation, there is no basis to process the petition and direct an election.

Accordingly, we reverse the Regional Director's Decision and Direction of Election and dismiss the petition.<sup>15</sup>

## **ORDER**

The petition is dismissed.

MEMBER HURTGEN, concurring.

The issue in this case is whether the Union was seeking Section 9 recognition from the Employer (Western Pipeline, Inc.), as distinguished from seeking Section 8(f) recognition. If it were the former, the RM petition would be processed. If not, it would not be processed.

For the reasons set forth in my dissent in *Oklahoma Installation Co.*, 325 NLRB 741, (1998), I find that the Union never achieved Section 9(a) status with respect to Western Pipeline Company or TPCO. Although these two companies had a contractual relationship with the Union, it is undisputed that neither the Union nor its Locals ever made any contemporaneous showing of majority support. Further, the language of the contract did not clearly specify that Section 9(a) recognition was extended. Accordingly, that contract did not constitute a Section 9 contract.

The Union claims that the Employer is an alter ego of the two companies mentioned above, and that the Employer is thereby bound to the contract. However, inasmuch as the contract (with the two companies) was a Section 8(f) contract, and inasmuch as the Union seeks to

<sup>&</sup>lt;sup>10</sup> The Regional Director noted Tammy Morgan's testimony that the Employer is engaged in the construction industry, installing sewer, water, and gas lines, etc. TPCO performed cast-in-place concrete pipe work. Both types of work are typical of construction industry employers; the Union is the District Council of Laborers, a union that typically represents construction industry employees; and, finally, in its brief the Employer represents that it is engaged in the building and construction trades. Consequently, we find that the evidence establishes that the Employer is engaged, and TPCO was engaged, in the construction industry. *Indio Paint & Rug Center*, 156 NLRB 951 (1966).

<sup>&</sup>lt;sup>11</sup> John Deklewa & Sons, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert denied 488 U.S. 889 (1988).

<sup>&</sup>lt;sup>12</sup> J & R Tile, 291 NLRB 1034 (1988). See also Golden West Electric, 307 NLRB 1494 (1992).

<sup>&</sup>lt;sup>13</sup> The Memorandum Agreement states that the "individual employer or association hereby voluntarily recognized the Union as the majority collective bargaining representative of all employees" and "agrees that the Union has demonstrated that it is the majority representative of such employees."

<sup>&</sup>lt;sup>14</sup> See PSM Steel Construction, 309 NLRB 1302 (1992).

<sup>&</sup>lt;sup>15</sup> In light of our decision to dismiss the petition, we find it unnecessary to rule on the Union's motion to reopen the record.

impose that contract on the Employer, it is clear that the Union is seeking to have the Employer sign a Section 8(f) contract. Thus, the Union is not seeking Section 9 recognition, and the RM petition must be dismissed.<sup>1</sup>

I recognize that the record contains a memorandum agreement purporting to establish Section 9 status. However, as my colleagues correctly note, there is no evidence that the Union ever showed this agreement to the Employer, and never asked that it be signed.

relationship with the signatories was a Sec. 9 relationship. In the instant case, it was not.

<sup>&</sup>lt;sup>1</sup> I agree with my colleagues that there is not in fact an alter ego relationship between the signatories and the Employer. However, in my view, if a union *claims* such an alter ego relationship, that would be sufficient to support an RM petition by the Employer, provided that the